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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF BRANDES, A DISBARRED ATTORNEY,

Appellant.

No. 162

20 Eagle Street
Albany, New York 12207
September 08, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: The next matter on
2 the calendar is number 162, Matter of Brandes.

3 MR. MCDONOUGH: May I reserve two minutes,
4 please?

5 CHIEF JUDGE DIFIORE: Yes, you may.

6 MR. MCDONOUGH: May it please the court, my
7 name is Chris McDonough; I'm the attorney for Joel
8 Brandes, the appellant herein.

9 Mr. Brandes was denied reinstatement by the
10 Appellate Division Second Department on the ground
11 that he violated Judiciary Law Section 90(2) and the
12 order of disbarment, which inter alia directed that
13 he desist and refrain from practicing law in any form
14 and from giving to another an opinion as to the law
15 or its application in any advice - - - or any advice
16 in relation thereto.

17 The Appellate Division prefaced its opinion
18 by characterizing Mr. Brandes as being a noted
19 authority and expert on New York family law and
20 divorce. It held that because of his efforts - - -

21 JUDGE ABDUS-SALAAM: That's true, isn't it,
22 counsel? He is - - - he is a noted authority.

23 MR. MCDONOUGH: No question.

24 JUDGE ABDUS-SALAAM: Yeah.

25 MR. MCDONOUGH: Yes.

1 JUDGE GARCIA: But counsel, and I know your
2 - - - your position on that is that oh, because he is
3 this noted authority who is held to a different
4 standard, I don't - - - I have trouble reading the
5 Appellate Division that way.

6 I read the Appellate Division decision to
7 say that's a factor, and it's a factor in looking at
8 was he really in this paralegal role, however you
9 want to define that; I don't think the title is that
10 important, but in that role he was acting in, was he
11 acting as an attorney or not?

12 And one of the factors they looked at was
13 that he has this expertise that admittedly is more
14 than the attorneys who were working on the case, and
15 they said because of that, I think, they were more
16 skeptical that he wasn't acting as the attorney in
17 the case.

18 So they weren't holding him to a higher
19 standard because of his expertise. What they were
20 saying, as I read it, was his expertise is a factor
21 in our analysis of what he was actually doing.

22 MR. MCDONOUGH: With all due respect, I
23 would say that if you read the opinion, but for his
24 intelligence, expertise, and his writing of the book
25 on family law, he would have been readmitted.

1 Because the committee - - -

2 JUDGE FAHEY: So is your argument, if he
3 was a less capable attorney, that he would be
4 readmitted?

5 MR. MCDONOUGH: Yes, I do.

6 JUDGE FAHEY: I see.

7 JUDGE GARCIA: But couldn't there be an ar

8 - - -

9 JUDGE FAHEY: So he's being punished for
10 his own success, then.

11 MR. MCDONOUGH: I think it's being held
12 against him; I don't know if I'd use the word
13 "punishment". But it certainly is - - - you say a
14 factor, but it's a factor that puts him in a - - - in
15 a singular class all by himself or with perhaps other
16 very, very bright disbarred lawyers.

17 JUDGE FAHEY: Are - - - are there any other
18 examples you can point us to were this is a - - -
19 this analysis has ever been used - - - this
20 particular analysis?

21 MR. MCDONOUGH: You mean a legal analysis?

22 JUDGE FAHEY: Yeah. This particular
23 analysis. This is a core of your equal protection
24 argument; am I right?

25 MR. MCDONOUGH: Well, the equal protection

1 argument is because of the class. And the class
2 itself is undefined and un - - - and in fact is
3 undefinable. So that's our position, is that it's -
4 - - it's not a measurable class - - -

5 JUDGE FAHEY: I see.

6 MR. MCDONOUGH: - - - and it's a class of
7 one, based on a very amorphous observation by the
8 court. And in fact, if you look at the record - - -
9 and one of the problems with this case is that we
10 never got the record that goes to the court from the
11 Committees on Character and Fitness - - - but the
12 transcript of the hearing - - -

13 JUDGE FAHEY: Well, can I just - - - can I
14 - - -

15 MR. MCDONOUGH: Yes.

16 JUDGE FAHEY: I - - - I don't mean to be
17 rude, but I just want to stay on this point, because
18 it seems that the depth of his experience is not a
19 condition determining whether or not he's practicing
20 law. You can be an incompetent attorney and be
21 violating the judiciary law and the order the court,
22 just as if he were a competent attorney.

23 MR. MCDONOUGH: Correct.

24 JUDGE FAHEY: Correct.

25 MR. MCDONOUGH: But the - - -

1 JUDGE FAHEY: So you understand why I'm
2 having a hard time with the competence argument?

3 MR. MCDONOUGH: Well, we - - - we're
4 arguing that the competence is a nonissue; it's a
5 nonstarter.

6 JUDGE FAHEY: I see.

7 MR. MCDONOUGH: Because whether every
8 attorney - - -

9 JUDGE FAHEY: So - - - so this - - - the
10 reference to a diadem was wrong in the record, sort
11 of, in essence.

12 MR. MCDONOUGH: We - - - our position is
13 they were - - - they were wrong by classifying him as
14 - - - in that class - - -

15 JUDGE FAHEY: Um-hum.

16 MR. MCDONOUGH: - - - separate from other
17 similarly situated disbarred attorneys who are
18 practicing as paralegals.

19 But the oth - - - the other fact is, is
20 that when we go back to the transcript of the
21 character and fitness hearing, the testimony was not
22 Joel Brandes saying I'm such a great expert; it was a
23 question - - - it was colloquy between the - - - the
24 subcommittee panel and Mr. Brandes, where they asked
25 him if he is in fact an expert or more experienced in

1 the area of family law.

2 And I think, based on his experience for
3 thirty or forty years practicing in the field, that
4 that was an honest answer. But I think that it
5 unfairly now puts a burden on him where he is now
6 with, perhaps - - - how would he prove that he was
7 not brighter than the attorney who he gave advice to?
8 Especially since the record in this case does not
9 have any testimony whatsoever as to who he gave
10 opinions to and who he worked for. There was
11 reference to perhaps two instances, and both of those
12 instances were where he wrote or - - - or gave advice
13 to lawyers with very specific insular situations.

14 CHIEF JUDGE DIFIORE: So Mr. McDonough, may
15 I ask you to focus for a moment on the plain language
16 of the disbarment order, which states that, I
17 believe, something to the effect that Mr. Brandes
18 can't give an opinion to anyone on the law or the
19 application of the law. How does that fit in - - -

20 MR. MCDONOUGH: Well, a paralegal can give
21 advice and do legal research. Let's - - - let's put
22 that to the side though.

23 CHIEF JUDGE DIFIORE: But I'm talking about
24 the disbarment - - -

25 MR. MCDONOUGH: Yes.

1 CHIEF JUDGE DIFIORE: - - - order that - -
2 -

3 MR. MCDONOUGH: Disbarment order says - - -

4 CHIEF JUDGE DIFIORE: - - - that directs
5 Mr. Brandes' future conduct.

6 MR. MCDONOUGH: The disbarment order says
7 that he cannot violate 487 of the Judiciary Law,
8 which is the unauthorized practice of law statute.

9 CHIEF JUDGE DIFIORE: Um-hum.

10 MR. MCDONOUGH: And then it goes on to say
11 inter alia that he must desist and refrain from
12 practicing law in any form and giving to another an
13 opinion as to the law or its application or any
14 advice in relation thereto.

15 The keyword in this is "another". 487,
16 Subsection 90 of the Judiciary Law were all designed
17 to protect the public. And if we look at Dacey,
18 Rowe, and these courts' prior - - - this court's
19 prior opinions, we're looking at protecting the
20 public.

21 "Another", as prohibited in the disbarment
22 order, means the general public. It doesn't mean - -
23 -

24 JUDGE GARCIA: But doesn't it also have
25 another section of that that says - - - and maybe you

1 said it and I'm sorry - - - "practicing law in any
2 form either as a principal or as an agent, clerk or
3 employee of another"?

4 MR. MCDONOUGH: Yes, it does. But the - -
5 - the premise - - - the - - - the precedent to that
6 is you have to prove that he's practicing law. And
7 in this case, we're saying he wasn't practicing law
8 because any nonlawyer, be they disbarred or never
9 barred, can draft papers for a lawyer who then
10 reviews them and puts - - - signs their names.

11 JUDGE FAHEY: So, I mean, this - - -

12 MR. MCDONOUGH: I could - - - for example,
13 a law clerk - - -

14 JUDGE FAHEY: So let me get your - - - your
15 rule then would be any disbarred lawyer can be a
16 paralegal or work in a law firm.

17 MR. MCDONOUGH: I would have a caveat to
18 that, because I believe - - - because we have to
19 protect the public. And - - - and in my own
20 experience - - - this is anecdotal, but we want to
21 keep separation between that disbarred lawyer and the
22 client.

23 And in this particular case, Mr. Brandes
24 was in Florida, where it is permitted by statute to
25 practice as a - - - a disbarred lawyer can practice

1 as a paralegal, independent and for a lawyer and - -
2 -

3 JUDGE ABDUS-SALAAM: But counsel, your - -
4 - what I think Judge Fahey is asking is, what is the
5 rule that you would want us to adopt for any
6 disbarred lawyer, not just one who's in another state
7 - - -

8 MR. MCDONOUGH: Okay. I think - - -

9 JUDGE ABDUS-SALAAM: - - - but someone
10 right here in New York?

11 MR. MCDONOUGH: I think that in this case,
12 and I - - - I would recommend, and my - - - for
13 whatever it's worth, that a disbarred lawyer be
14 allowed the same leeway and work as a paralegal;
15 however, the Appellate Division can always - - - and
16 this court can insist that there be no advice - - -
17 no contact with clients, no direct contact with
18 clients, no public contact, whatever it feels is
19 necessary to protect the public.

20 JUDGE PIGOTT: Why do you have to go - - -
21 you know, it's colloquial up in the Fourth
22 Department, where I am, where we're talking about
23 lawyers and we say they're not even allowed to dust
24 the books in the legal library. I mean, we're - - -
25 we're pretty strict about staying away. And I get,

1 you know - - - you know, you've got a unique
2 individual here who is very - - - he's got a great
3 talent that, you know, should be used. But that - -
4 - ours is a very bright line. I - - -

5 MR. MCDONOUGH: And - - - and when I first
6 started working for the grievance committee in 1989,
7 my boss told me the same thing; but that's not the
8 law. And if you look recently at the most recent
9 case out of their office, Matter of Weber, there were
10 no charges against Mr. Weber for using a disbarred
11 lawyer, only that he allowed that disbarred lawyer to
12 act in such a way as he engaged in the unauthorized
13 practice of law.

14 JUDGE FAHEY: Yeah. You know, there's that
15 case, and you're probably familiar with it - - -
16 Christianson out of North Dakota. And - - and they
17 talk about this situation, and it says - - - they
18 say, it seems to say that he could do everything a
19 law clerk or a layman could do, except appear in open
20 court.

21 And that seems to be the rule that you're -
22 - - you're advocating here. And it was referred to
23 as a penalty lightly borne. It seems in New York,
24 while you're right, in some places they - - - they
25 have made it lighter, but - - - but in New York, the

1 penalty is much stricter.

2 MR. MCDONOUGH: I - - - I think that the
3 penalty is very strict, but in this case, Mr. Brandes
4 didn't practice law. That - - - that is the base of
5 our opinion.

6 JUDGE FAHEY: And the core of that is
7 because he was representing lawyers or he was working
8 with lawyers, and not with a nonlawyer.

9 MR. MCDONOUGH: I would prefer to say that
10 he was employed by lawyers to assist them with
11 specific legal problems. And if we look at Dacey,
12 you know, the interesting language in Dacey, or the
13 controlling language is where - - -

14 JUDGE FAHEY: Is Dacey the "How to Avoid
15 Probate"?

16 MR. MCDONOUGH: The probate book?

17 JUDGE FAHEY: Yeah.

18 MR. MCDONOUGH: Yes. And the Justice
19 Stevens' dissent was adopted by the court, where
20 Justice Stevens wrote that there was no unauthorized
21 practice of law because "there was no personal
22 contact or relationship with a particular individual,
23 nor does there exist that relation of confidence and
24 trust so necessary to the status of attorney and
25 client. That is the essential of legal practice, the

1 representation and the advising" - - -

2 JUDGE FAHEY: Well, wouldn't it compare
3 though to "Law and the Family", the book that Mr.
4 Brandes wrote? He's not prevented from selling that,
5 is he?

6 MR. MCDONOUGH: No.

7 JUDGE FAHEY: Okay.

8 MR. MCDONOUGH: In fact, he writes the
9 supplements for that.

10 JUDGE FAHEY: I think so.

11 MR. MCDONOUGH: But to just finish that
12 quote, "the representation and the advising of a
13 particular person in a particular situation," I think
14 is key.

15 And in this case, Mr. Brandes didn't advise
16 a client with a problem.

17 JUDGE GARCIA: Couldn't the - - - couldn't
18 they take into account the original action for which
19 your client was disbarred, and in that case it was,
20 I'm not your lawyer; go to the court and say, I'm not
21 you lawyer, but I'm really your lawyer. And now,
22 it's, I'm not the lawyer; I'm the paralegal.

23 So couldn't they take that into account in
24 assessing whether or not your client is practicing
25 law here?

1 MR. MCDONOUGH: They could have taken that
2 into account, certainly. However, the evidence in
3 the record is such that there was no testimony. The
4 com - - - subcommittee appointed by the committee
5 recommended his admission after looking at this - - -

6 JUDGE GARCIA: Couldn't the Appellate
7 Division take that into account?

8 MR. MCDONOUGH: Here's the problem with the
9 Appellate Division taking that into account, is we
10 were never given the opportunity - - - notice or
11 opportunity to be heard on the issue. It was not an
12 issue in - - - in the statement - - - in the
13 subcommittee hearing; and from what we understand, it
14 wasn't an issue in the committee - - -

15 JUDGE GARCIA: But it's an issue in
16 reinstatement, right, that this was - - -

17 MR. MCDONOUGH: The reinstatement - - -

18 JUDGE GARCIA: - - - the conduct you were
19 disbarred for?

20 MR. MCDONOUGH: He - - - the reinstatement
21 statue says that we, as petitioners, have the
22 obligation to prove by a preponderance of the
23 credible evidence that we currently have - - -
24 currently have, the character and fitness necessary
25 to be an attorney.

1 Mr. Brandes was disbarred, I think, in
2 2001. He's lived a very good life since then, very
3 conscientious about his paralegal practice; and in my
4 opinion, it would be very unfair and flies in the
5 face of the statute which allows reinstatement after
6 seven years, without a finding that he's not
7 currently - - - doesn't currently possess the
8 requisite character and fitness.

9 CHIEF JUDGE DIFIORE: Thank you, sir.

10 MR. MCDONOUGH: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. CABLE: May it please the court, I'm
13 Robert Cable, the assistant counsel to the
14 respondent, the New York State Grievance Committee
15 for the Tenth Judicial District.

16 JUDGE GARCIA: Counsel, what's our standard
17 of review here, of the Appellate Division?

18 MR. CABLE: Abuse of discretion and
19 whether or not there was sufficient evidence in the
20 record to sustain the finding of that court without
21 reaching the merits of the court's determination
22 based on its evaluation of the facts.

23 JUDGE ABDUS-SALAAM: Do we have to define
24 what is the practice of law, or more particularly,
25 what is not the practice of law in order to determine

1 Mr. Brandes is doing, and - - - and yet we recognize
2 it, we need it, and we say it's - - - it's great, and
3 as I think one of the points being made here is, he's
4 got a double problem because he's so good.

5 That's crazy, in my opinion.

6 MR. CABLE: Well, then we differ, Judge;
7 it's not crazy. There is no actual equivalence
8 between a layperson paralegal and a disbarred lawyer
9 working as a paralegal.

10 JUDGE PIGOTT: Well, no, I'm trying to
11 focus on the work. You know, in other words, if - -
12 - if A-Rod, you know, who's suspended from baseball,
13 says, you know, what I'm going to do is, you know,
14 I'm going to go out and teach kids, you know, how to
15 play the game, and somebody says, well, because
16 you're so good at it you obviously are "playing
17 baseball", and you're in violation of the
18 commissioner's rules, people would say stop, right?

19 MR. CABLE: There were - - - there is work
20 that paralegals do beyond clerical tasks, such as
21 doing legal research, preparing memoranda of law, or
22 even drafting legal papers that are traditionally
23 associated as attributes of the practice of law.

24 However, in the case of paralegals, it is
25 not considered the unauthorized practice of law as

1 long as particular conditions are - - - are applied,
2 such as direct close supervision by an admitted
3 attorney, absolutely no client contact, and not
4 exercising judgment towards the client or the
5 client's problem, but following - - -

6 JUDGE PIGOTT: Not my paralegals.

7 MR. CABLE: All right.

8 JUDGE PIGOTT: I mean, don't a lot of them
9 say, you got a whackball out there, and you know, if
10 you want me to go do this for them, I will, but, you
11 know, spare me.

12 CHIEF JUDGE DIFIORE: Is the distinction
13 that that the paralegal works internally with that
14 law firm from what your - - - your view on Mr.
15 Brandes' con - - -

16 MR. CABLE: In most - - - in most context,
17 yes, they are working internally. There are attor -
18 - - there are contract paralegals who - - - who work
19 with smaller firms. But in the case of this
20 appellant, he wasn't even acting as an employee of
21 anyone; he was a freelancer.

22 JUDGE FAHEY: Well, but - - - but the real
23 distinction is, this is a penalty arising out of a
24 disbarment. If - - - he could have practiced as a
25 paralegal, or a lawyer, or any of those kind of

1 things before, but because of the vio - - - because
2 of the particular violations of the rules and the
3 disbarment orders, in point of fact, the right to
4 exercise and to act as a paralegal is a penalty.

5 MR. CABBLE: Precisely. The disbarment
6 order itself has the language that separates a
7 disbarred lawyer from a layperson, and it's what
8 separates the avail - - - the ability of a disbarred
9 lawyer from operating as a paralegal and a layperson
10 from - - -

11 JUDGE ABDUS-SALAAM: Are you - - - are you
12 - - - you said - - - you mentioned freelance
13 paralegals, counsel.

14 MR. CABBLE: Yes.

15 JUDGE ABDUS-SALAAM: So do we have those in
16 New York? We probably do. We probably do have
17 people - - -

18 MR. CABBLE: We probably do, but one of the
19 - - -

20 JUDGE ABDUS-SALAAM: Well, un - - - let's
21 say unadmitted lawyers, JDs who, you know, maybe work
22 for different people drafting papers or whatever they
23 do. So are they practicing law?

24 MR. CABBLE: Well, there was the case, many
25 years ago, of People v. Alfani that this case (sic)

1 determined where that's very similar. You had a non-
2 attorney who was in the business of drawing legal
3 papers up for the public. And - - -

4 JUDGE ABDUS-SALAAM: No, not for the
5 public, for lawyers, for - - - you know, freelancing
6 for lawyers, not for the public.

7 MR. CABLE: Well - - - well, if you're
8 speaking of a lay paralegal, yes. A lay paralegal is
9 certainly qualified and permitted - - -

10 JUDGE ABDUS-SALAAM: I'm talking - - -

11 MR. CABLE: - - - to do such things. But
12 a disbarred lawyer - - -

13 JUDGE ABDUS-SALAAM: Well, what do you mean
14 by a lay para - - - someone who has a JD but hasn't
15 bothered to get admitted or whatever, you know, just
16 can't be bothered, and they're earning a living
17 drafting papers for various lawyers, not a particular
18 employer, but other - - - you know, a bunch of
19 lawyers.

20 MR. CABLE: That person is not a disbarred
21 lawyer, and that's what separates the whole - - -

22 JUDGE GARCIA: Couns - - -

23 MR. CABLE: - - - category of disbarred
24 lawyers from nondisbarred lawyers.

25 JUDGE GARCIA: Counsel, are - - - what

1 troubles me a little bit here is, aren't we getting a
2 little confused with the label side of things? And
3 we're certainly not going to make a rule that being a
4 paralegal is practicing law or isn't practicing law,
5 because I've been in different places, government
6 nongovernment, where paralegals mean very different
7 things.

8 So the label "paralegal" to me means
9 nothing. It can be making copies, which certainly
10 wouldn't be practicing law for anyone; it can be
11 walking into court and doing something which would be
12 practicing law for anyone, not that lawyers would do
13 that.

14 So to me, this is a very fact-specific
15 case, and what - - - we're trying to define the
16 practice of law. The practice of law is the practice
17 of law. And the question to me here is, under these
18 facts, was the Appellate Division wrong in concluding
19 - - - as a matter of law, were they wrong in
20 concluding he was practicing law?

21 MR. CABLE: No, they were correct in the
22 concluding - - -

23 JUDGE GARCIA: No, but isn't that the issue
24 here; it's on these facts - - -

25 MR. CABLE: On these facts, the issue is

1 whether or not - - -

2 JUDGE GARCIA: - - - was this person - - -

3 MR. CABLE: Yes.

4 JUDGE GARCIA: - - - practicing law? Not
5 was he a paralegal; you know, was he a disbarred
6 paralegal. It's what he was doing looking at the
7 practice of law, and is that the practice of law, and
8 did they make an error, a legal error, in concluding
9 that?

10 MR. CABLE: I agree with your framing of
11 the issue, but I conclude that the Appellate Division
12 did not err. They did not err because Mr. Brandes
13 crossed the line. Where he crossed the line was in
14 drawing upon his stock-in-trade, which was his
15 expertise in matrimonial and divorce law in New York.

16 JUDGE ABDUS-SALAAM: So if he - - - if he
17 had drafted memoranda on things that didn't involve
18 family law or didn't involve his expertise, that
19 would have been okay?

20 MR. CABLE: As long as it wasn't in the
21 context of some real-life client problem, that would
22 be okay. That would be closer to merely publishing a
23 general audience treatise, as he does.

24 JUDGE PIGOTT: I didn't know if this was at
25 issue or not, but my - - - the claim here is that he

1 only did this in Florida, right?

2 MR. CABLE: Well, he did it from Florida,
3 yes.

4 JUDGE PIGOTT: Well, do we have
5 jurisdiction in Florida? In other words, if he goes
6 down there and says, you know, I'm doing what is
7 allowed in Florida; I know I can't do this in New
8 York, but I can do it in Florida, is he in violation
9 of your order?

10 MR. CABLE: Yes, he is.

11 JUDGE PIGOTT: Why?

12 MR. CABLE: Because the consequences are
13 here in New York.

14 JUDGE PIGOTT: Well - - -

15 JUDGE GARCIA: The attorneys were here, in
16 New York.

17 MR. CABLE: The attorneys were here, in
18 York.

19 JUDGE PIGOTT: That he worked for?

20 MR. CABLE: His entire - - - his entire
21 website is geared to New York law. He testified at
22 the subcommittee hearing, I only know New York law.

23 JUDGE ABDUS-SALAAM: But he didn't - - -
24 according to your adversary, there was nothing in the
25 record saying who his "clients" were, the lawyers

1 that he would give advice to or draft papers for.

2 MR. CABLE: Well, I don't know that - - -
3 that due process or - - - or reviewing the evidence
4 requires that there be a name attached to the client.

5 If the description of the activity is
6 detailed enough to give the finder of fact a notion
7 of what this appellant was doing while he was
8 disbarred and working from his computer in Florida -
9 - -

10 JUDGE ABDUS-SALAAM: So if - - - if his
11 client - - -

12 MR. CABLE: - - - then that's sufficient
13 evidence.

14 JUDGE ABDUS-SALAAM: But if his clientele
15 were other - - - because see - - - my understanding
16 of his website was, it was all over the world; he got
17 clients from all over the world. That's - - - that
18 was my understanding; and maybe I'm wrong about that.
19 But what if he had only one or two New York lawyers
20 consulting with him, and there were lawyers
21 elsewhere, the bulk of his business came from lawyers
22 elsewhere?

23 MR. CABLE: Even one instance of the
24 unauthorized practice of law is the unauthorized
25 practice - - -

1 JUDGE PIGOTT: Really? You know, that's
2 what gets me. I mean, who we helping or hurting
3 here? Right. As counsel pointed out, you're - - -
4 you're disbarred for seven, and then you can come
5 back. And we say, well, wait a minute, you littered,
6 you know, we're not letting you back in for another
7 five years.

8 Now, I realize this isn't littering, but
9 you said, even if he did it once we're not letting
10 him back. It almost sounds like a vendetta to me.

11 MR. CABLE: Well, the record here doesn't
12 indicate that this was a one only.

13 JUDGE PIGOTT: I know, but you said that.

14 MR. CABLE: Or a one-off instance.

15 JUDGE PIGOTT: You said that.

16 MR. CABLE: Well, I was - - - in response
17 to the question - - -

18 JUDGE PIGOTT: I know.

19 MR. CABLE: - - - there is - - - there
20 were cases from this court in which one instance only
21 is enough to constitute the practice of law. These -
22 - - the separate issue is the one you're raising, is
23 that enough - - -

24 JUDGE PIGOTT: Yeah.

25 MR. CABLE: - - - to continue to have

1 someone disbarred for more than seven years? On the
2 facts of this case, the answer is, yes.

3 CHIEF JUDGE DIFIORE: Mr. Cabbie, would you
4 address the issue that was raised with the appellant
5 regarding the plain language - - - I'm getting back
6 to that - - - in the disbarment order, that directs
7 Mr. Brandes, I think it said, not to give to another
8 any opinion as to the law or its application? Just
9 that discrete directive.

10 MR. CABBLE: That's the directive that's
11 contained in Judiciary Law Section 90(2), which is
12 required in all disbarment orders.

13 CHIEF JUDGE DIFIORE: Um-hum.

14 MR. CABBLE: And in - - - in - - - in my
15 analysis of the case, that's the controlling language
16 here; that is what Mr. Brandes did which he is not
17 supposed to do; it's what separates him to go back to
18 labels from a non - - -

19 CHIEF JUDGE DIFIORE: Is that separate from
20 the unauthorized practice of law?

21 MR. CABBLE: I think that it's an attribute
22 of it. I think that in sort of a reverse way,
23 Section 90 is telling us, up to a point, what is the
24 practice of law. And the practice of law, by
25 prohibiting that activity is - - - the legislature

1 was telling us that that is the practice of law.

2 But I look at it more in the context - - -
3 the specific context of a suspended or disbarred
4 lawyer, because giving of the - - - the giving of an
5 opinion, although that is also the practice of law,
6 in the case of a disbarred lawyer it's an express
7 prohibition.

8 And that's what separates him from all the
9 other people he wants to compare himself to who do
10 paralegal work.

11 CHIEF JUDGE DIFIORE: And is there any
12 authority that defines "another"?

13 MR. CABLE: I could not find a case that
14 focused on that one particular word, but it would
15 seem to stand to reason that "another" means anyone.

16 You could be giving an opinion to your Aunt
17 Tilly; that's the practice of law. If you're giving
18 an opinion to another lawyer, that's the practice of
19 law under that formulation under Judiciary Law
20 Section 90.

21 JUDGE ABDUS-SALAAM: So - - - so counsel,
22 how - - - how is a disbarred lawyer supposed to know
23 what they can do and what they cannot do if it's just
24 very fact specific. And you - - - I guess you have
25 to look at each - - - if - - - if the decision in

1 this case becomes a precedent for what you can do as
2 a lawyer and what you can't do as a lawyer, would
3 someone who has a particular expertise in some area
4 of the law say, gee, I better not do anything
5 connected with that, because if the decision goes
6 your way as opposed to Mr. Brandes' way, then I'll
7 have been considered to have practiced law - - -

8 MR. CABBLE: Well, I - - - I think - - -

9 JUDGE ABDUS-SALAAM: - - - in violation of
10 my disbarment order?

11 MR. CABBLE: I think - - - I think a rule
12 of this dimension might be proper guidance. And it
13 would be that activity by a disbarred lawyer in any
14 capacity related to the law is improper, particularly
15 if that activity draws on any skill, training, or
16 expertise, or experience that disbarred attorney - -
17 -

18 JUDGE PIGOTT: If you have a disbarred - -
19 - if you have a disbarred personal injury lawyer and
20 I'm - - - I'm trying to settle a case, and I want to
21 know what his value is, can I call up somebody who is
22 that experienced and say, what do you - - - what's
23 the value you put on in this leg-off case?

24 MR. CABBLE: I think that would be a
25 violation of the disbarment order.

1 that relationship of attorney and client.

2 Now, the court seems to be implying that -
3 - - and it actually said that because of Mr. Brandes'
4 vast experience, his giving of advice to another
5 lawyer turned that other lawyer into his client.

6 There's no contract, there's no agreement,
7 there is no fiduciary duty that's necessary in every
8 attorney-client relationship.

9 JUDGE PIGOTT: But the Chief Judge quoted
10 that part of 90(2); and isn't that pretty all-
11 encompassing?

12 MR. MCDONOUGH: I'm sorry, I - - -

13 JUDGE PIGOTT: The section of the - - - of
14 the Judiciary Law, Section 90(2). 90 colon - - -
15 90(2).

16 CHIEF JUDGE DIFIORE: The disbarment order
17 that - - - the directive that he can't give to
18 another an opinion as to the law - - -

19 JUDGE FAHEY: Section 3 of the disbarment
20 order.

21 MR. MCDONOUGH: No. And - - - and again,
22 487 and Section 90(2) are designed to protect the
23 public.

24 I don't think the - - - the enactors of
25 these rules ever anticipated this particular

1 argument. And - - - and I think the term "another"
2 might be somewhat sloppy, and now maybe we need to
3 address it.

4 JUDGE PIGOTT: Judge Garcia asked earlier,
5 you know, what our standard of review is - - -

6 MR. MCDONOUGH: Um-hum.

7 JUDGE PIGOTT: - - - and I think someone
8 said that it's, you know, abuse of discretion; do you
9 agree with that?

10 MR. MCDONOUGH: Yes. Yeah.

11 CHIEF JUDGE DIFIORE: Okay.

12 MR. MCDONOUGH: But at this - - - I think
13 that to go back to one of the questions you asked,
14 Judge, is it time to define at least what a disbarred
15 lawyer - - - lawyer can or can't do, and that is - -
16 - I would love to see that, because all of my clients
17 - - - well, some of them actually win, but most of
18 them end up in this situation. And I admit that.

19 But it also points out that in this case
20 Mr. Brandes did everything he could. And he, as it -
21 - - we're all confused. Even though he's really
22 bright, he was also confused, and he did the best he
23 could, and this unfair - - -

24 JUDGE GARCIA: Counsel, I'm sorry to
25 interrupt you, but I think your time is expiring. On

1 this point of defining what they can and can't do, I
2 mean, one, you have the order; two, you have, you
3 can't practice law. And your client practiced law
4 for a long time. Do we really have to define for him
5 what it means to practice law?

6 MR. MCDONOUGH: No, but I think - - - well,
7 no jurisdiction in the country has actually defined
8 the practice of law. And that of course is a huge
9 problem. But we can - - -

10 JUDGE GARCIA: So what should we do?

11 MR. MCDONOUGH: - - - define the - - - we
12 can - - - we can define the unauthorized practice of
13 law a little more tightly. We could - - -

14 JUDGE GARCIA: But would it be, do - - -
15 you can - - - you can do a brief but somebody has to
16 (inaudible) you. Is that really for this court to
17 define?

18 MR. MCDONOUGH: That - - - that I don't
19 know. I mean, that - - - I'm not an appellate
20 lawyer; I'm a grievance lawyer. But - - - but in
21 this case, there is confusion, and that - - - and it
22 should be addressed.

23 CHIEF JUDGE DIFIORE: Thank you, sir.

24 MR. MCDONOUGH: Thank you.

25 (Court is adjourned)

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C E R T I F I C A T I O N

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Brandes, a Disbarred Attorney, No. 162 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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